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## Creating Reasonable Accommodations Without an Undue Burden: The Future Effects the ADA Will Have on Golf Courses

Janet Barbookles

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# COMMENT

## CREATING REASONABLE ACCOMMODATIONS WITHOUT AN UNDUE BURDEN: THE FUTURE EFFECTS THE ADA WILL HAVE ON GOLF COURSES

No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any private entity who owns, leases (or leases to), or operates a place of public accommodation.<sup>1</sup>

### INTRODUCTION

Imagine a golf cart sitting ten yards from the edge of a green.<sup>2</sup> This cart has a special feature that lifts a person from the seat of the golf cart to the point on the green where the player's golf ball rests. Now imagine a sand trap with a handicap ramp to allow a golf cart to drive into the bunker.<sup>3</sup> Are these potential accommodations that a golf club may have to provide for a disabled golfer to comply with Title III of the Americans with Disabilities Act (hereinafter "ADA")? Would

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<sup>1</sup> 28 C.F.R. § 36.201(a) (2001).

<sup>2</sup> The "putting green" is all ground of the hole being played which is specially prepared for putting. DECISION ON THE RULES OF GOLF 2000-2001 (United States Golf Association and the Royal and Ancient Golf Club of St. Andrews, 1999 at Definitions 10). Green is a term used that references a "putting green." *Id.*

<sup>3</sup> A bunker is a hazard consisting of a prepared area of ground, often a hollow, from which turf or soil has been removed and replaced with sand or the like. *Id.* at 3. A sand trap is another name for bunker. *Id.*

## 72 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33]

such accommodations be reasonable, or would they create an undue burden for golf clubs by materially altering the infrastructure and design of a golf course while adding an exorbitant expense?

Golf is a game that thrives on tradition; and for that reason, many people in the golf industry are resistant to change.<sup>4</sup> Congress specifically enacts regulations such as the ADA, to deal with industries, programs and agencies that are less inclined to voluntarily accommodate disabled individuals.<sup>5</sup> There are limits, however, to the ADA. These limits may include not requiring clubs to provide specialized carts or allowing disabled golfers to use these carts to access greens, tees and bunkers.

The recent United States Supreme Court decision allowing Casey Martin, a touring golf professional, to use a motorized cart during the Professional Golf Association's (hereinafter "PGA") sponsored tournaments has shaken the tradition-bound world of golf.<sup>6</sup> The Court determined that using a golf cart during competition would not fundamentally alter the nature of the game, and since golf courses were specifically identified as a public accommodation under ADA regulations, the PGA could not discriminate against either spectators or competitors on the basis of a disability.<sup>7</sup> In light of the Casey Martin decision, both public and private golf clubs now face possible modifications to accommodate disabled golfers in compliance with the ADA.<sup>8</sup> Golfers with disabilities are confronted with policies concerning not only access to the course, but the additional rules established by each individual golf club. For instance, at many golf courses, golf carts are prohibited from the fairways of par-three holes, putting greens and teeing-grounds.<sup>9</sup> Most courses issue a red flag for golfers with medical

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<sup>4</sup> Telephone Interview with Roger Pretekin, founder of SoloRider Industries., in Denver, Colorado (Oct. 9, 2002).

<sup>5</sup> The Americans with Disabilities Act, 42 U.S.C. § 12101 (West 1995).

<sup>6</sup> PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001).

<sup>7</sup> See *Id.* at 661-663.

<sup>8</sup> Dan Marshall, Equal Access: *The Americans with Disabilities Act and Your Golf Course*, Club Management, Vol. 80, Issue 5 (October 2001).

<sup>9</sup> *Id.* at 3. A "teeing ground" is defined as the starting place for a hole to be played. This definition is consistent with the United States Golf Association definition, which describes a teeing-ground as a rectangular area two-club lengths in depth, with the front and sides defined by the outside limits of two-tee markers. DECISION ON THE RULES OF GOLF 2000-2001 (United States Golf Association and the Royal and Ancient

problems to allow them access to these prohibited areas on a limited basis. Few courses, however, allow disabled golfers to drive directly onto a green.<sup>10</sup>

Recently, it has been suggested that golf clubs may be required to provide specialized golf carts that can be driven on greens, teeing-grounds and sand traps.<sup>11</sup> Club professionals, course superintendents and golf course designers are concerned about this type of accommodation.<sup>12</sup> Putting greens are very fine and easily damageable parts of the golf course and are expensive to maintain.<sup>13</sup> Additionally, sand traps require special attention and upkeep.<sup>14</sup> Providing specialized golf carts for greens and sand traps that would not damage the surface of the green or tear down the ridge of a trap is likely to be a very expensive accommodation. The higher degree of maintenance for added protection of the course will also increase a club's expenses.<sup>15</sup>

This Comment examines the possible accommodations and structural improvements that golf course owners may be required to provide for disabled golfers to comply with ADA regulations. Part I discusses Title III of the ADA, which ensures that private entities offering commercial facilities and providing places of public accommodations provide equal access to all.<sup>16</sup> Part II examines possible future accommodations, the reasonableness of these accommodations and whether they create an undue burden for golf clubs.<sup>17</sup> Part III argues ways in which possible accommodations might fundamentally alter the nature of professional golf.<sup>18</sup> Part IV recommends achievable solutions for golf clubs in making reasonable accommodations to golf courses without creating an undue

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Golf Club of St. Andrews, 1999 at Definitions 11).

<sup>10</sup> MARSHALL, *supra* note 8.

<sup>11</sup> PRETEKIN, *supra* note 4.

<sup>12</sup> Telephone Interview with Steve Carter, PGA Golf Club Professional, in Ipswich, Massachusetts (Sept. 24, 2002). The content of the interviews conducted with Steve Carter do not reflect the opinions, arguments or ideas of the golf corporation for which he works. See also PRETEKIN, section 15.4.8; Putting Greens available at <http://www.solorider.com/compliance.html>.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> See *infra* notes 21-70 and accompanying text.

<sup>17</sup> See *infra* notes 71-196 and accompanying text.

<sup>18</sup> See *infra* notes 197-221 and accompanying text.

## 74 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33]

financial burden.<sup>19</sup> Lastly, Part V concludes that while ADA compliance issues within the golf industry still exist, golf clubs are capable of providing reasonable access to courses for disabled players without creating an undue burden.<sup>20</sup>

## I. BACKGROUND

## A. AMERICANS WITH DISABILITIES ACT

Today, the ADA is the primary form of federal protection for disabled Americans.<sup>21</sup> Before the enactment of the ADA, when federal, state and local governments regulated or discriminated based on disabilities, there was no heightened level of scrutiny.<sup>22</sup> In 1985, the United States Supreme Court found that disabled individuals were not part of a protected class under the Equal Protection Clause.<sup>23</sup> The Court required only a rational basis examination, thus severely limiting disabled individuals' constitutional protections.<sup>24</sup>

In response to the forty-three million Americans who have "one or more physical or mental disabilities," Congress enacted the ADA in 1990 to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.<sup>25</sup> Congress found that individuals with disabilities continually encounter various forms of discrimination, including failure to make modifications necessary to allow access to existing facilities and practices.<sup>26</sup>

The ADA is divided into four titles: Title I applies to employment discrimination, Title II relates to state and local governments providing public services, Title III applies to private entities offering commercial facilities and providing places of public accommodation, and Title IV relates to

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<sup>19</sup> See *infra* notes 222-230 and accompanying text.

<sup>20</sup> See *infra* note 231-232 and accompanying text.

<sup>21</sup> See 42 U.S.C. § 12101 (2000).

<sup>22</sup> *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 446-447 (1985).

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> 42 U.S.C. § 12101 (2000). Today, more than fifty-two million Americans have disabilities. *Martin v. PGA Tour, Inc.* 984 F. Supp. 1320 (D. Or. 1998). See discussion in Michael Waterstone, *Let's Be Reasonable Here: Why the ADA Will Not Ruin Professional Sports*, 00 B.Y.U.L 1489 (2000).

<sup>26</sup> 42 U.S.C. § 12101 (2000).

telecommunications and common carriers.<sup>27</sup> This Comment will focus on Title III of the ADA. Title III was established in 1992 to ensure that places of public accommodation and commercial facilities provide equal opportunity to all patrons by being accessible to and usable by individuals with disabilities.<sup>28</sup> Public accommodations include private entities that own, lease or operate public establishments. Such establishments include places that serve food and drink and facilities for exercise and recreation, including golf courses.<sup>29</sup>

#### B. WHAT CONSTITUTES A REASONABLE ACCOMMODATION AND AN UNDUE BURDEN?

Under 42 U.S.C. § 12182, places of public accommodation must make reasonable modifications in their policies, practices or procedures so that individuals with disabilities can have equal access to the wide variety of establishments that are available to non-disabled individuals.<sup>30</sup> Public entities are not required to make “reasonable modifications” if they can demonstrate that making such modifications would fundamentally alter the nature of the goods, services, facilities, privilege, advantages or accommodations offered or would result in an undue burden.<sup>31</sup> In determining what constitutes an undue burden, courts consider: 1) the nature and costs of the action, 2) the financial resources of the site involved, 3) the number of persons employed at the site, 4) the effect on expenses and resources, 5) the administrative and financial relationship of the site to the corporation; and if applicable, 6) the overall financial resources of the parent corporation and the number of its facilities.<sup>32</sup>

Although the ADA does not precisely define the test of reasonableness, the test usually involves a fact-specific, case-by-case inquiry that considers the effectiveness of the modification in light of the nature of the disability in question, and the cost to the organization that would implement it.<sup>33</sup>

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<sup>27</sup> 42 U.S.C. §§ 12111;12117, §§ 12131;12165, §§ 12181;12189, §§ 225; 711 (2000).

<sup>28</sup> 42 U.S.C. § 12182(a) (2000).

<sup>29</sup> 42 U.S.C. § 12181(7) (2000).

<sup>30</sup> 42 U.S.C. § 12182(2)(A)(ii) (2000).

<sup>31</sup> 42 U.S.C. § 12182(2)(A)(ii)-(iii) (2000).

<sup>32</sup> 28 C.F.R. § 36.104 (2001).

<sup>33</sup> *Staron v. McDonald's Corp.*, 51 F.3d 353, 356 (1995).

## C. JUDICIAL HISTORY OF THE ADA EFFECTS ON THE PROFESSIONAL GAME OF GOLF

In March 2000, the Seventh Circuit Court of Appeals decided that the use of a cart is an unreasonable accommodation and would fundamentally alter the nature of the U.S. Open golf competition.<sup>34</sup> Ford Olinger, a professional golfer who suffers from a bilateral avascular necrosis, a degenerative condition that significantly impairs his ability to walk, brought an ADA claim against the United States Golf Association (hereinafter "USGA") for failing to allow him use of a golf cart to qualify for the U.S. Open.<sup>35</sup> The USGA contended that the use of a cart by a player would fundamentally alter the nature of the tournament because it would remove stamina from the set of qualities designed to be tested in the U.S. Open.<sup>36</sup> Therefore, such an alteration would be an unreasonable accommodation.<sup>37</sup>

In addressing this argument, the court relied on a similar case in which the term "fundamentally altered" originated.<sup>38</sup> In *Southeastern Community v. Davis*,<sup>39</sup> a deaf nursing student was unable to complete the required clinical work in her program and requested that the school allow her to substitute the required work with different work.<sup>40</sup> The United States Supreme Court held that the requested accommodation was unreasonable because the Rehabilitation Act was not intended to accommodate an individual who cannot meet all of a program's requirements, and that lowering standards to accommodate people is not a reasonable modification.<sup>41</sup>

Using this rationale, the Seventh Circuit Court of Appeals in *Olinger* ruled that the nature of the competition would be fundamentally altered if the walking rule were eliminated because it would remove stamina from the set of qualities designed to be tested in golf.<sup>42</sup> Thus, to accommodate Olinger's

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<sup>34</sup> See *Olinger v. USGA*, 205 F. 3d 1001, 1005-1006 (7<sup>th</sup> Cir. 2000).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 1003.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> See generally *Southeastern Community v. Davis*, 442 U.S. 397 (1979).

<sup>40</sup> *Olinger*, 205 F.3d at 1007.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

disability by allowing him the use of a cart would be fundamentally altering the nature of the game.<sup>43</sup> Consequently, the USGA did not have to make cart accommodations for Olinger.<sup>44</sup>

A similar case was brought before the Ninth Circuit Court of Appeals by Casey Martin, a professional golfer who suffers from Klippel-Trenaunay-Weber Syndrome, a degenerative circulatory disorder that obstructs the flow of blood from his right leg back to his heart causing him severe pain.<sup>45</sup> Due to this progressive disease, Martin cannot walk an 18-hole golf course without the risk of hemorrhaging, developing blood clots and possibly enduring an injury that may require the amputation of his leg.<sup>46</sup> The Ninth Circuit determined that allowing Martin to use a cart during tournaments would not fundamentally alter the nature of the PGA competition.<sup>47</sup> The Court of Appeals did not discuss whether use of carts in general would fundamentally alter the competition, but whether the use of a cart by Martin would do so.<sup>48</sup> Moreover, the court determined that Martin endures greater fatigue even with a cart than his able-bodied competitors do by walking.<sup>49</sup> Thus, Martin's use of a cart does not give him an unfair advantage over the rest of the playing field.<sup>50</sup> The court stated, "[a]ll that the cart does is permit Martin access to a type of competition in which he otherwise could not engage because of his disability."<sup>51</sup>

On appeal, the United States Supreme Court agreed with the Ninth Circuit Court of Appeals and reasoned that allowing Martin to use a cart during competition would not give him an unfair advantage over the rest of the field.<sup>52</sup> First, due to Martin's disability, he endures greater fatigue with a cart than his competitors do by walking.<sup>53</sup> Additionally, pure chance would have a greater impact on the outcome of the tournament

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Martin v. PGA Tour, Inc.* 204 F.3d 994, 996 (9th Cir. 2000).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 1000.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *PGA Tour Inc.*, 532 U.S. at 690.

<sup>53</sup> *Id.*



## 78 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33]

than fatigue from walking.<sup>54</sup> The Court concluded that the use of a golf cart has only a peripheral impact on the nature of the sport and therefore, does not fundamentally alter the nature of the game.<sup>55</sup> The Court said the essence of golf is "shot-making."<sup>56</sup> The fundamental element of the sport is using clubs to cause a ball to progress from the teeing ground to a hole some distance away with as few strokes as possible.<sup>57</sup> Lastly, the court reasoned that using a cart does not fundamentally alter the nature of the game because the PGA's walking rule is not an indispensable feature of tournament golf.<sup>58</sup> The Court stated that if walking were a fundamental aspect of golf, then all PGA sponsored tours, such as the Senior PGA Tour and the first two rounds of "Q-school,"<sup>59</sup> should require the "walking rule."<sup>60</sup>

## D. HOW THE ADA APPLIES TO PRIVATE GOLF COURSES

Private clubs are exempt from Title III ADA regulations.<sup>61</sup> Private entities, however, that own, lease or operate public establishments for public accommodations and commercial facilities are regulated under Title III.<sup>62</sup> Specific criteria determine whether a club is exclusively private.<sup>63</sup> Courts look at the selectivity of the membership process, whether substantial membership fees are charged, whether an entity is operated on a non-profit basis and the extent to which the facilities are open to the public.<sup>64</sup> Thus, the more selective the membership, the greater the membership fees and the less

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<sup>54</sup> *Id.* at 687.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 683.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 685.

<sup>59</sup> Q-school is one of the various ways of gaining entry onto the PGA Tour. *PGA Tour, Inc.*, 532 U.S. at 665. Any member of the public may enter Q-school by paying a \$3,000 entry fee and submitting two letters of reference. *Id.* Use of a golf cart is permissible for the first two rounds of Q-school, but prohibited from the third and final round. *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> 42 U.S.C. § 12187 (2000).

<sup>62</sup> 42 U.S.C. § 12182 (2000).

<sup>63</sup> 42 U.S.C. § 12181(7) (2000).

<sup>64</sup> *Americans with Disabilities: Practice and Compliance Manual*, Chapter 4: Public Accommodations and Architectural Barriers § 4:47 (July 2002). *See also* Association Management, "Do ADA Requirements apply to your programming?" Volume 53, Issue 2; ISSN: 0004-5578 (Feb. 1, 2001).

open to the public, the greater the chances the clubs will be considered private.<sup>65</sup>

Although private clubs are exempt from ADA Title III obligations, a private club is considered a public accommodation if the facilities of the private club are made available to customers or patrons.<sup>66</sup> The United States Department of Justice (hereinafter "DOJ") takes an extremely narrow view of the definition of "private."<sup>67</sup> If a private golf club allows any public play on its course or functions at the facility, then it is required to comply with the ADA.<sup>68</sup> Facilities are available for the public, for example, when a local high school team is allowed to practice at the club's course, the club sponsors a tournament where non-members pay an entrance fee to play on the course, or the club extends facilities to non-members for a wedding reception.<sup>69</sup> The above scenarios illustrate that when a private club makes its facilities available for commercial use to the public it must adhere to ADA regulations.<sup>70</sup>

## II. POSSIBLE FUTURE ACCOMMODATIONS

The United States Supreme Court ruling allowing Casey Martin to use a golf cart while competing in PGA-sponsored events has caused the golf industry to question and interpret the ADA's future impact on recreational and professional golf.<sup>71</sup> Creation of the technical specifications and rules for achieving the mandate established by the ADA is the responsibility of the United States Architectural and Transportation Barriers Compliance Board (hereinafter "Access Board").<sup>72</sup> The Access Board has delegated this responsibility to a committee known

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<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Roger Pretekin, SoloRider Industries, available at [http://www.solorider.com/accessibility\\_faqs.html](http://www.solorider.com/accessibility_faqs.html) (last visited Feb. 11, 2003).

<sup>68</sup> *Id.*

<sup>69</sup> PRETEKIN, *supra* note 4.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> The Access Board: A Federal Agency Committed to Accessible Design available at <http://www.access-board.gov/> (last visited Feb. 17, 2003). The Access Board is an independent Federal Agency devoted to accessibility for people with disabilities. See also PRETEKIN, available at <http://www.solorider.com/opinions.html> (last visited Nov. 21, 2002).

## 80 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33]

as the Recreation Access Advisory Committee (hereinafter "Advisory Committee"), which makes recommendations to the ADA for guidelines to be adopted and enforced by the DOJ as a supplement to the ADA regulations.<sup>73</sup> Guidelines for golf course accessibility have not been adopted to date.<sup>74</sup> There are, however, proposed rules for golf courses issued by the Advisory Committee, such as the number of accessible tee boxes, accessible golf cart passages and greens access.<sup>75</sup> Golf courses are under increasing pressure to review their facilities and their compliance with the ADA.<sup>76</sup> Future ADA compliance regulations for golf courses could impact: 1) the use of specialized golf carts; 2) access to greens, teeing-grounds and bunkers and; 3) the PGA Tour.

## A. SPECIALIZED GOLF CARTS

Most disabled golfers cannot use standard golf carts.<sup>77</sup> A disabled golfer that needs to play from a sitting position on a cart would not be able to because standard carts are designed for two players.<sup>78</sup> Additionally, such disabled golfers would not be able to use a standard cart because the clubs are stored on the back of the cart, making access to the clubs impossible without getting out of the cart.<sup>79</sup> Thus, disabled golfers need specialized carts with assistive devices to make it easier to maneuver around a golf course.<sup>80</sup>

1. *The AteeA Golf Cart*

In the early 1990's, Roger Pretekin founded American Golf Car Incorporated<sup>81</sup> after becoming aware of the large numbers

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> PRETEKIN, *supra* note 67.

<sup>76</sup> *Id.*

<sup>77</sup> PRETEKIN, *supra* note 4.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> PRETEKIN, available at <http://www.solorider.com/about.html> (last visited Feb. 11, 2003). In 1999, American Golf Car Inc. changed its name to SoloRider Industries to more clearly describe the company's focus on single-rider vehicles. *Id.* In early 2001, SoloRider and Club Car, Inc. announced a strategic alliance wherein SoloRider would produce their single-rider adaptive golf car with the name Club Car 1-Pass and Club Car would market and sell the products through their worldwide distribution network.

of persons with disabilities who desired access to pro tour events.<sup>82</sup> Pretekin began to think of ways that persons with disabilities could not only watch golf, but also participate in the sport.<sup>83</sup> The AteeA and 1-Pass model are electric golf carts designed to safely transport disabled persons around a golf course.<sup>84</sup> These carts offer a number of features specific to a disabled golfer's needs.<sup>85</sup> First, the AteeA and 1-Pass are single person golf carts that provide a six-inch ground clearance for increased accessibility on the course.<sup>86</sup> Second, the golf bag rests on the front of the cart with club heads facing the golfer, as opposed to the vertical placement of the clubs in the back of the standardized golf cart.<sup>87</sup> With standard carts, players must get up from their seats and walk to the back of the cart to get their clubs.<sup>88</sup> This accommodation helps disabled golfers by allowing them to pull a club from their bag while seated on the cart.<sup>89</sup> Third, the handlebars on the AteeA and the 1-Pass control the brakes and speed.<sup>90</sup> Fourth, the carts provide a 360-degree, lockable swivel seat that allows golfers to hit the ball from either side or from the back of the cart.<sup>91</sup> Lastly, for someone who has lost the use of his or her legs or has a hard time getting up from a chair, the AteeA can lift him or her into an upright standing position.<sup>92</sup>

## 2. *The Debate: A Club's Responsibility to Provide Specialized Golf Carts*

In a meeting for the Advisory Committee, attorneys for the DOJ indicated that golf carts should be considered an auxiliary

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*Id.*

<sup>82</sup> Roger Pretekin, SoloRider Industries available at <http://www.solorider.com/about.html>. (last visited Feb. 11, 2003).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> PRETEKIN, *supra* note 4.

<sup>90</sup> PRETEKIN, available at <http://www.solorider.com/thegolfcar.html>.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

## 82 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33]

aid rather than a personal assistive device.<sup>93</sup> According to section 36.303,

A public accommodation shall take those steps necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the public accommodation can demonstrate that taking those steps would fundamentally alter the nature of the goods, services, facilities, privileges, advantages or accommodations being offered or would result in an undue burden, i.e., significant difficulty or expense.<sup>94</sup>

Under 36.303(b)(3), auxiliary aids include the acquisition or modification of equipment or devices.<sup>95</sup> Thus, golf carts could be considered an "auxiliary aid," such that golf course facilities, rather than the disabled individual, would have the responsibility for providing a specialized golf cart.<sup>96</sup> The DOJ reasoned that if a golf course or club provides golf carts for the general population, it should have a responsibility to provide carts with adaptive devices for golfers who require them.<sup>97</sup>

On the other hand, the ADA does not set forth rules regarding which aids must be provided.<sup>98</sup> A public accommodation is not required to provide the best auxiliary aid, rather, only a reasonable accommodation.<sup>99</sup> Reasonable does not mean in any manner in which disabled individuals prefer.<sup>100</sup> For example, the ADA does not require a restaurant to provide menus in Braille for blind customers.<sup>101</sup> As long as the restaurant provides staff that can read the menu to blind customers, the restaurant is considered providing a reasonable accommodation.<sup>102</sup> The expense of printing one or two menus

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<sup>93</sup> *Id.*

<sup>94</sup> 28 C.F.R. § 36.303(a) (2001); referring to website available at <http://www.usdoj.gov/crt/ada/reg3a.html#Anchor-97857> (last visited Feb. 11, 2003).

<sup>95</sup> 28 C.F.R. § 36.303(b)(3) (2001); (referring to website available at <http://www.usdoj.gov/crt/ada/reg3a.html#Anchor-97857>) (last visited Feb. 11, 2003).

<sup>96</sup> PRETEKIN, *supra* note 72.

<sup>97</sup> *Id.*

<sup>98</sup> 56 Fed.Reg. 35567 (1991); (referring to 28 C.F.R. § 36.303(a) (2001)).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Michael N. Petkovich, Comment, *Consumer Rights Under the Americans with Disabilities Act*, 4 LYCLR 44, 48 (1992). See also 56 Fed.Reg. 35556 (1991); (referring to 28 C.F.R. § 36.303(b) (2001)).

<sup>102</sup> *Id.*

in Braille is probably low, even if a restaurant changes the menu a few times a year. This example illustrates that the threshold for reasonable accommodations is low.<sup>103</sup> Thus, requiring golf clubs to provide specialized carts that cost a few thousand dollars seems to be a maximum and desirable accommodation, but likely not a reasonable accommodation.

Steve Carter, PGA golf club professional, presents another argument in favor of not requiring golf clubs to provide specialized carts because, in his opinion, there are no similarly required accommodations for any other public entity, such as ski resorts and grocery stores.<sup>104</sup> Currently, ski resorts are not required to provide specialized skis for the disabled, nor are grocery stores required to supply specialized shopping carts to accommodate disabled food shoppers.<sup>105</sup> Again, although such accommodations are desirable, they would create an undue burden for the public entity because there are many different types of disabilities. Thus, it would be too difficult to provide accommodations for every type of disability. For instance, specialized skis for persons with one leg are a different type of accommodation needed than for persons who need to ski with their knees. Similarly, with respect to grocery carts, a specialized cart for a shopper without arms requires a different type of accommodation than that required by a person that cannot walk. In these circumstances, the different types of specialized skis or carts that disabled people would need would create a financial burden on a ski resort or grocery store. Public facilities are making reasonable accommodations for disabled customers if patrons of a ski resort or a grocery store bring their own equipment tailored to their specific needs, are allowed to use their specialized equipment, and the facilities are in compliance with the structural guidelines laid out by the ADA. For the same reasons, there are strong arguments that both private and public golf clubs should not be required to provide specialized golf carts for handicapped golfers.<sup>106</sup>

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<sup>103</sup> 56 Fed.Reg. 35567 (1991); (referring to 28 C.F.R. § 36.303 (2001)).

<sup>104</sup> CARTER, *supra* note 12.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

### 3. Does Requiring Golf Clubs to Purchase the AteeA Create an Undue Burden?

Title III of the ADA states that private entities do not have to make “reasonable modifications” if they can demonstrate that making such modifications would fundamentally alter the nature of the goods, service, facility, privilege, advantage or accommodation being offered or would result in an undue burden.<sup>107</sup> A requested accommodation causes a fundamental alteration if it results in an undue burden or hardship to the public accommodation.<sup>108</sup> Courts interpreting the ADA have held that the imposition of a financial and administrative burden on an entity is sufficient justification to deny requested modifications.<sup>109</sup>

Depending on whether a club has a private or public status, requiring golf clubs to purchase specialized carts could create a financial and administrative burden.<sup>110</sup> Specialized golf carts such as the AteeA and the 1-Pass cart are more expensive than the \$4,000 standard two-seat electric golf cart.<sup>111</sup> The 1-Pass cart and the AteeA cost approximately \$7,200 with the up-right chair lift option, and \$6,000 without.<sup>112</sup>

#### a. Private Golf Courses

In *Slaby v. Berkshire*, a federal district court in Maryland ruled that owners of a private golf course were not required to put an elevator in the club house to allow disabled members to reach the second floor and basement.<sup>113</sup> The court found that since only 300 of the 10 million golfers in the United States use wheelchairs, and it would cost \$80,000 to install an elevator, such accommodation would create an undue burden.<sup>114</sup> Similar

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<sup>107</sup> 42 U.S.C. § 12182(2)(A)(iii) (2000).

<sup>108</sup> *Sandison v. Michigan High School Athletic Ass'n Inc.*, 64 F.3d 1026 (Mich. 1995).

<sup>109</sup> *Id.*

<sup>110</sup> CARTER, *supra* note 12.

<sup>111</sup> PRETEKIN, *supra* note 4.

<sup>112</sup> Roger Pretekin, SoloRider Industries available at <http://solorider.com/news/newsmcdonald.html>. (last visited Nov. 21, 2002).

<sup>113</sup> *Slaby v. Berkshire*, 928 F. Supp. 613, 616 (MD. 1996).

<sup>114</sup> *Id.*

arguments could be made with respect to private golf clubs.<sup>115</sup> Members of private membership golf clubs<sup>116</sup> pay monthly dues to the club.<sup>117</sup> Some of these dues help pay for maintenance of the golf course and updating equipment and facilities.<sup>118</sup> Thus, providing an AteeA or 1-Pass golf cart should depend upon whether a private club has a disabled member. If a private club does not have a disabled member, requiring a club to keep an AteeA or 1-Pass golf cart in storage creates an undue additional expense for the club. Instead of spending \$15,000 of the club's budget for two AteeA cars, they could replace old carts with three or four new standard carts that are used on a consistent basis throughout the year. With respect to guests, private clubs should not be responsible for making accommodations for a member's guest. For one, if a club should not be required to provide specialized cart for its own members, it should not be required to provide carts for its member's guests. Additionally, the amount of money that it would cost to have specialized carts "on-reserve" for when a member brings a disabled guest is an unreasonable accommodation and creates the same undue financial burden as mentioned above.

In addition, there is a difference between a club adding two carts to an existing fleet and substituting two specialized golf carts for two standard carts. For example, if the ADA determines that each golf club has to provide one AteeA golf cart for every nine holes, most courses would have to purchase two specialized golf carts. If a club adds two specialized carts to its fleet, a club would have increased expenses for oil, battery maintenance and possibly training people for mechanical issues and training disabled golfers on how to use the chair. Golf clubs that purchase these specialized carts to avoid being sued for non-compliance with the ADA may end up

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<sup>115</sup> This refers to private clubs that have private membership guidelines, but open club facilities to the public on a limited basis.

<sup>116</sup> There is a difference between an "exclusively private golf club" and a "private membership golf club." An exclusively private club does not allow non-members to use club facilities at all. Private membership clubs, however, often open up their facilities to non-members on a limited basis. CARTER, *supra*, note 12.

<sup>117</sup> *Id.* Steve Carter indicated that this was the common practice for most clubs to the best of his knowledge and the practice of his golf club in Ipswich, Massachusetts. *Id.*

<sup>118</sup> *Id.*



## 86 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33]

being sued by someone who is injured while using the specialized cart due to lack of training.

A similar situation would occur if a club needs to substitute two AteeA carts for two standardized carts. This type of accommodation creates increased expenses as well. First, the number of carts a club has in its fleet is proportionate to the memberships of the club. Thus, if the club replaces a standard golf cart that fits two players with a specialized golf cart that only seats one, the club is not gaining two carts, rather just losing two. This cart substitution is an illogical accommodation for a club without any disabled members to make because the club would not be getting maximum use from these carts, whereas, if the club had two standardized carts, they would be used continuously. Thus, if a private club does not have a disabled member that regularly needs the use of a specialized golf cart, there is a strong argument that requiring a club to "keep one on hand" is impractical and creates an undue expense for a business.

On the other hand, there are arguments for having at least two AteeA golf carts available "just in case." If a member of a private club suddenly becomes injured, he may need a specialized cart to get around the course. In this situation, there is a greater argument for requiring a club to purchase a cart for its fleet. Furthermore, non-disabled players can use the AteeA as well.<sup>119</sup> Allowing non-handicap golfers to use the AteeA golf carts could create a financial benefit for private golf clubs.<sup>120</sup> Even though private clubs allow members unlimited use of the course, many clubs charge members a cart fee for each round of golf played for every player.<sup>121</sup> There is no way for a member to avoid paying a cart fee because most clubs require the use of a cart during prime-time tee times to speed up the pace of play on the course.<sup>122</sup> Thus, the faster the pace of play, the more money the club makes because they can get more rounds in on the course. Since the AteeA can be driven

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<sup>119</sup> PRETEKIN, *supra* note 4.

<sup>120</sup> *Id.*

<sup>121</sup> CARTER, *supra* note 12. For example, in a foursome, a club that charges a \$20 cart fee per person makes an \$80 profit. A foursome is a golf term that describes four people playing a round of golf. *Id.* Typically, the maximum number of players in a group for a round of golf is limited to four. *Id.*

<sup>122</sup> PRETEKIN, *supra* note 4.

all over the course, a club could send the early tee-time players off with the AteeA, which will set the pace for the day allowing the club to get more rounds around the course. As opposed to the time consuming 90 degree rule<sup>123</sup> and the cart path only rule,<sup>124</sup> the AteeA can access all parts of the golf course, including greens, which will ultimately save time, pick up the pace of play and possibly produce more revenue for a club.<sup>125</sup>

#### b. Public Golf Courses

Public golf courses face different issues. Public courses do not have membership requirements and are open to anyone who wishes to play.<sup>126</sup> Public courses can be privately owned or managed by a city, town or municipality.<sup>127</sup> Although public golf courses are not as expensive to maintain as private, they face similar, if not more, financial burdens than private golf clubs.<sup>128</sup>

In *Rodenberg-Roberts v. KinderCare Learning Ctrs.*, a federal district court in Minnesota ruled that a day care center would suffer an undue financial burden for individual care of a disabled child.<sup>129</sup> The court reasoned that the \$95 per week loss for the local center was a sizable financial detriment for a facility of this type operating "on a shoestring budget."<sup>130</sup> Similarly, requiring public golf courses to provide specialized

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<sup>123</sup> CARTER, *supra* note 12. Traditionally, golf carts are not driven sporadically across fairways. *Id.* Instead, most courses follow a 90-degree rule whereby golf carts must remain on the cart path until the driver can take a 90-degree turn onto the fairway to reach the point where the ball rests. *Id.* This rule is to keep carts off the fairways as much as possible to protect the integrity of the grass. *Id.*

<sup>124</sup> The Access Board: A Federal Agency Committed to Accessible Design available at <http://www.access-board.gov/> (last visited Feb. 17, 2003). See also PRETEKIN, available at <http://www.solorider.com/compliance.html>. A "golf car passage" is defined as a continuous passage on which a motorized golf car, also known as a golf cart, can operate. *Id.* Designers and operators sometimes use the term "golf car path" to identify what the Board is defining as a golf car passage. *Id.* Because the term "golf car path" may connote a prepared surface, the term was not use. *Id.* While a golf car passage must be usable by golf cars, it does not necessarily need to have a prepared surface. *Id.* The "cart path only" rule requires players to keep their golf carts on cart paths at all times. A player must walk from the cart path to the point on the course where his ball rests.

<sup>125</sup> PRETEKIN, *supra* note 4.

<sup>126</sup> CARTER, *supra* note 12.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Rodenberg-Roberts v. KinderCare Learning Ctrs.*, 896 F. Supp. 921 (Minn. 1995).

<sup>130</sup> *Id.* at 927.

## 88 GOLDEN GATE UNIVERSITY LAW REVIEW [Vol. 33]

golf carts could create a financial hardship to a club. Public golf course budgets for course maintenance and equipment are not as great as those of private golf clubs.<sup>131</sup> Public golf courses do not receive monthly membership dues.<sup>132</sup> Rather, public courses pay for equipment and course maintenance with revenue from public use of the course and possibly from funds set aside by state or local governments.<sup>133</sup> In essence, public golf clubs' profit margins are not as large as those of private clubs.<sup>134</sup> If public courses were required to purchase one AteeA cart for every nine holes, would an eighteen-hole public golf course be in violation of the ADA for not being able to accommodate five disabled golfers on a particular day?

Requiring both public and private golf courses to provide specialized golf carts could create an undue financial burden.<sup>135</sup> Such burdens may include the previously mentioned additional expenses for oil, battery maintenance, and possible training for mechanics and riders.<sup>136</sup> If a club does not get to use a cart at least 70% of the time, keeping these carts "just-in-case" creates a financial burden.<sup>137</sup> Again, a public golf course is similar to other public facilities, such as grocery stores and ski resorts. Thus, both private and public golf clubs should not have to provide specialized golf carts for disabled players.

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<sup>131</sup> CARTER, *supra* note 12.

<sup>132</sup> *Id.*

<sup>133</sup> CARTER, *supra* note 12. Steve Carter mentioned that the money a public or municipal course receives from a state or local government is not significant. He described it as "very little, if any." *Id.*

<sup>134</sup> CARTER, *supra* note 12.

<sup>135</sup> *Id.*

<sup>136</sup> Telephone Interview with Steve Carter, PGA Golf Club Professional, in Ipswich, Massachusetts (Nov. 1, 2002). The additional expenses for oil and battery maintenance are little. In Steve Carter's opinion, however, training for mechanics could be costly. *Id.* Considering the mechanical and structural make-up of the AteeA is different from a standard cart, club mechanics will need to be trained on how to fix the specialized carts. *Id.* SoloRider Industries is located in Denver, Colorado, thus it is not practical to send a cart back to the manufacturer if the 'swivel seat breaks. *Id.* Steve Carter stated, "it is unlikely that SoloRider will hire and send their mechanics all over the country to fix AteeA golf carts." *Id.* Hence, Carter stated "the potential added expenses would create an undue burden, especially for a public club with a lower budget for maintenance and repairs." *Id.*

<sup>137</sup> *Id.*

## B. ACCESS TO GOLF COURSE GREENS AND BUNKERS

According to 42 U.S.C. § 12182(2)(A)(ii), a place of public accommodation must make reasonable modifications in policies, practices or procedures, to afford accommodations to individuals with disabilities.<sup>138</sup> Public entities, however, do not have to provide such accommodations if they can demonstrate that making such modifications would fundamentally alter the nature of such goods, services or facilities.<sup>139</sup>

Cart paths that many golf clubs provide are inadequate for disabled golfers.<sup>140</sup> Often they are too far from the greens, tees and bunkers, thus, making access difficult for disabled players.<sup>141</sup> Providing adequate access to golf courses for disabled golfers is a primary problem.<sup>142</sup> The trouble is determining which accommodations are reasonable. Disabled golfers not only need access to golf course fairways, but also to greens, tees and bunkers.<sup>143</sup> Advocates of the AteeA believe that this cart should be permitted to be driven on all parts of a golf course, including those parts where carts are normally prohibited such as greens, bunkers and tee grounds.<sup>144</sup>

*1. Golf Carts on Greens: Reasonable Accommodation or Undue Burden?*

Golf course operators are concerned that allowing golf carts to enter, maneuver within and exit putting greens will severely damage the greens and require them to be closed for extended periods of time for repairs.<sup>145</sup> Thus, damage from the carts will cause additional maintenance costs to repair and preserve playable greens. Greens are the most expensive part of the golf course.<sup>146</sup> For many golf courses, green maintenance takes up

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<sup>138</sup> 42 U.S.C.S. § 12182(2)(A)(ii) (2000).

<sup>139</sup> *Id.*

<sup>140</sup> PRETEKIN, *supra* note 4.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> CARTER, *supra*, note 12.

<sup>146</sup> *Id.* These estimates also came from EarlDShafer@aol.com from Greens, Tees and Things Online Inquiry Form "The costs to maintain a golf course can be highly variable, depending on location, type of climatic conditions, size, species of grass being cultivated, and level of conditioning. Some operate for as little as \$200-\$250,000; some

about thirty percent of a club's budget.<sup>147</sup> Depending on the type of golf course and the area of the country, installing new greens can cost in excess of \$25,000 per hole.<sup>148</sup> Maintaining greens costs about \$15,000 to \$20,000 per hole each season.<sup>149</sup>

Carts on greens can cause even more damage during periods of bad weather.<sup>150</sup> Courses on the east coast open at the end of March or early April when there tends to be a lot of rain and the grass is beginning to recover from the icy and snowy winter.<sup>151</sup> Greens during this time of year are sensitive and very wet.<sup>152</sup> A golf cart on a green in March, April or May could cause severe damage to the green.<sup>153</sup> The beginning of a season is a critical time for course superintendents to nurture the greens into good playable conditions.<sup>154</sup> The pressure from a cart on a soft and wet green can cause extensive damage.<sup>155</sup> In the summer, however, when the weather is dry and there is less rain, golf carts on greens may not cause as much damage.<sup>156</sup>

AteeA designers on the other hand, insist that the specialized golf cart can be driven on greens, including soft and wet ones, without causing damage because the cart exerts less pressure than a player walking on a green.<sup>157</sup> This is because the AteeA has low ground pressure that is evenly distributed on all four tires, resulting in less than half the ground pressure of a typical standing person. Roger Pretekin, founder of SoloRider Industries states, "the AteeA causes far less damage to a green than the mowing machines that go over the greens

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over \$1,000,000; but the norm is probably in the \$500,000 range for 18 holes. Approximately 70 % of this would normally be personnel expense. Greens are obviously the most costly, but the numbers for each area of maintenance vary greatly depending on the emphasis. The area of providing accommodations for the handicapped on golf courses is somewhat uncharted water as of yet. There hasn't been enough court cases yet to 'fashion' a list of things that the law will require." E-mail from EarlDShafer@aol.com (Oct. 2, 2002, 19:49:34 EDT)(on file with author).

<sup>147</sup> CARTER, *supra* note 12.

<sup>148</sup> U.S. Golfer available at <http://www.usgolfer.net/articles/august-howmuchgreen.html> (last visited Nov. 25, 2002).

<sup>149</sup> CARTER, *supra* note 12.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> CARTER, *supra* note 12.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> PRETEKIN, *supra* note 4.

everyday. Granted, if someone takes one of our vehicles and makes radical turns, it will cause damage, just as a person twisting their foot on the green would cause damage.”<sup>158</sup>

Allowing golf carts on greens also raises safety concerns.<sup>159</sup> Not all greens are flat; many are elevated with steep slopes.<sup>160</sup> A green that has a forty-degree slope is dangerous for a cart to drive up and down because a cart could potentially flip and roll over causing injury to the rider.<sup>161</sup> Thus, allowing carts to drive on greens poses liability issues and financial burdens for clubs.<sup>162</sup>

The problem with the ADA making generalized rules to apply to golf courses is that not all golf courses are the same. ADA compliance decisions must be made on individual circumstances. Course superintendents and golf club professionals are experts in the field of course maintenance and preserving the integrity of their course's turf. A possible solution, therefore, might be to have ADA specialists assess golf courses throughout the country by working together with a club superintendent and club pro and determine ways in which a particular course can become handicap accessible. This surveyor would be similar to an appraiser that assesses the value of property. Some courses cannot allow players to ride their carts on greens for safety reasons just as some courses cannot afford the additional costs for green maintenance. Thus, disabled players should have access to greens using a specialized golf cart if an ADA assessor determines there are no 1) safety issues; 2) that the physical integrity of the course is not threatened; and 3) that carts on greens will not create a financial burden.

There are advantages and disadvantages to this solution. An advantage is that every course in the United States that must comply with the ADA would be independently surveyed to determine which greens and tees can be reasonably accessed by disabled golfers on specialized carts. A disadvantage, however, is that this solution could be extremely costly. Since the ADA is a federal regulation, this would require the government to

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<sup>158</sup> *Id.*

<sup>159</sup> CARTER, *supra* note 12.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

create another branch of the Advisory Committee specifically for course surveyors, thus, creating additional expenses.

Alternatively, the Advisory Committee could enact general rules for golf course accessibility for the disabled. This solution has its advantages and disadvantages as well. An advantage is that the cost would be less than having an ADA assessor survey every course in the United States. To establish general rules, the Advisory Committee would have to conduct research and come up with certain guidelines. For instance, the Advisory Committee would need to determine the maximum degree of a slope that a specialized cart could access safely. As a result, golf course superintendents would then have the responsibility of determining the slopes of their course and make their local rules based on the guidelines established by the Advisory Committee. Hence, if a course's slope of a green or tee is greater than the maximum degree established by the Advisory Committee, then disabled golfers, for safety reasons, would not be able to access the green or tee with their specialized golf cart.

A disadvantage to general rules is that golf courses are unique. Thus, general rules would not take into consideration individual issues that different clubs face. Thus, an Advisory Committee would have to establish more general rules with broad and uncertain terms such as "undue burden" or "reasonable," making it difficult for clubs to determine whether they are in compliance.

## *2. Allowing Golf Carts in Bunkers is Not a Reasonable Accommodation*

Sand traps are another part of a golf course that disabled golfers have difficulty accessing because carts are prohibited.<sup>163</sup> In The Bangor Maine Daily News, Human Rights Commissioner of Maine stated, "I fear that the ADA will force the removal of hazards and sand traps from courses."<sup>164</sup>

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<sup>163</sup> PRETEKIN, *supra* note 4.

<sup>164</sup> The Bangor, Maine Daily News "When Handicaps are Disabilities: Golf Comes to Grips with the ADA" (Aug. 2000) available at <http://solorider.com/news/newsgolffmaine.html>. This quote was cited with respect to a case brought before the Maine Human Rights Commission by Paul Willey, a paraplegic golfer that wanted to use his own modified golf cart or be allowed to pay reduced green fees. His golf club instead insisted that he rent a cart. The Bangor Daily News

Contrary to the Commissioner's fear, eliminating bunkers from the game of golf, however, is not an option. Even though people dislike it when their ball falls in a trap, bunkers on a golf course are an integral part of the game.<sup>165</sup> Hence, golf clubs must make reasonable modifications in their policies to afford disabled golfers access to sand traps without creating an undue burden or substantially altering the nature of the game.<sup>166</sup>

In *Emery v. Caravan of Dreams*, a federal court in Texas ruled that failing to ban smoking at an entertainment theater did not violate the Americans with Disabilities Act because a smoking ban would be an unreasonable modification.<sup>167</sup> The plaintiff suffered from a respiratory ailment<sup>168</sup> and wanted the musical theater to ban smoking.<sup>169</sup> The defendant produced evidence that a ban smoking would result in national bands refusing to play at the theater, creating a negative economic impact on the theater.<sup>170</sup> The court determined that such an accommodation would endanger the defendant's viability as a business, and thus, modifications were not required.<sup>171</sup> Similarly, allowing golf carts in bunkers would be an unreasonable modification because such an accommodation creates financial and functional burdens as well as safety concerns.<sup>172</sup>

The cost of maintaining and preserving the composition of bunkers if golf carts are allowed access could present financial burdens. Extensive driving over a bunker may cause the edges of a sand trap to deform and possibly tear down the ridge of a

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coverage of Willey's hearing before the Maine Human Rights Commission stated that at least two Commission members did not understand what the Americans with Disabilities Act is all about. *Id.* The newspaper quoted one commissioner as fearing the ADA will force the removal of hazards and sand traps from courses, adding that: "I am horrified that the ADA might eliminate the sport." *Id.* The other commissioner worried that the ADA could be "carried to the point of absurdity" and force changes in courses, stating that "golf is a walking game, and I don't want the nature of the game to change." *Id.*

<sup>165</sup> CARTER, *supra* note 136.

<sup>166</sup> See 42 U.S.C. § 12182(2)(A)(ii) (2000).

<sup>167</sup> *Emery v. Caravan of Dreams*, 879 F. Supp 640, 644 (Tex. 1995).

<sup>168</sup> *Id.* at 642.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 644.

<sup>171</sup> *Id.*

<sup>172</sup> CARTER, *supra* note 136.



trap.<sup>173</sup> The costs of having to "fix these repairs" would have to be done several times a year.<sup>174</sup> This increase in maintenance expense could force clubs to choose between increasing their rates for a round of golf or not making the necessary repairs and forcing the course to suffer structural damage.<sup>175</sup> Consequently, such accommodations could discourage players from golfing at a certain course. If a course has a reputation for poor conditions, such as torn or un-kept bunkers, players would not pay expensive greens fees<sup>176</sup> to play that course.<sup>177</sup>

Further, allowing golf carts in sand traps will create functional burdens as well.<sup>178</sup> First, not all bunkers are similar.<sup>179</sup> Bunkers can be long and narrow, short and wide, and shallow or deep.<sup>180</sup> For bunkers with depth, getting a cart in and out would be difficult, if not impossible.<sup>181</sup> Requiring a club to install a handicap ramp is not a practical solution.<sup>182</sup> Once in the bunker, it would be difficult to move the golf cart around because of the sharp turns required.<sup>183</sup> Damage could result to the bunker requiring additional maintenance by the club.<sup>184</sup> Moreover, the last thing a player does after hitting the ball from a bunker is to rake all the marks they made in the sand.<sup>185</sup> A disabled player who cannot get out of the cart to hit a shot from a bunker would be similarly unable to get out of the cart to rake the bunker.

Lastly, there are liability and safety issues with allowing golf carts in sand traps.<sup>186</sup> In *Breece v. Alliance Tractor-Trailer Training II*, a federal district court ruled that the defendant's

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<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> Green fee is the charge levied to play the course. *My Golf Record*, definition available at <http://www.mygolfrecord.com/gterms.phy?action=list+letter=G>. (last visited Feb. 11, 2003).

<sup>177</sup> Especially when greens fees can range anywhere from thirty dollars (public courses) to the high end of three hundred dollars (private courses) a round.

<sup>178</sup> CARTER, *supra* note 136.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> DECISION ON THE RULES OF GOLF 2000-2001 (United States Golf Association and the Royal and Ancient Golf Club of St. Andrews, 1999 at Etiquette; Care of the Course 2).

<sup>186</sup> CARTER, *supra* note 136.

refusal to allow the plaintiff, a hearing-impaired individual, to participate in a tractor-trailer training program did not violate the Americans with Disabilities Act because such an accommodation would threaten the safety of the individual, his instructor and the public at large.<sup>187</sup> Similarly, allowing players to use golf carts in bunkers could create a safety threat to the disabled player. A disabled player's cart could get stuck in the trap or could flip when entering and exiting traps. Allowing golfers to determine which traps they can and cannot access safely is too much of a liability for clubs and course owners to take.

Disabled golfer and advocate for adequate golf course accommodations, John Nicholas, provides suggestions on how to integrate golf as an accessible sport for disabled recreational golfers.<sup>188</sup> He suggests that a disabled player's ball in a trap could be declared inaccessible.<sup>189</sup> Thus, after declaring the ball inaccessible, the player may remove the ball from the hazard<sup>190</sup> and drop the ball outside the hazard, no closer to the hole, with a one-stroke penalty.<sup>191</sup> This suggestion would be allowed for recreational golf. If, however, a disabled player was competing in a club tournament in which the rules are generally governed by the USGA, and the Royal and Ancient Golf Club of St. Andrews, the ball would not be allowed to be declared inaccessible and moved out of the hazard.<sup>192</sup> Without changing the USGA rules of the game, the only alternative for a disabled player who could not hit his ball out of a bunker would be to declare the ball unplayable.<sup>193</sup> If the player determines the ball unplayable, he must play the ball as nearly as possible at the

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<sup>187</sup> *Breece v. Alliance Tractor-Trailer Training II*, 824 F. Supp 576, 578-580 (Va. 1993).

<sup>188</sup> John Nicholas' Accessible Golf Website, Advocating golf as an accessible sport for everyone available at <http://hometown.aol.com/accessiblegolf/home.html> (last visited Nov. 25, 2002).

<sup>189</sup> *Id.*

<sup>190</sup> A bunker is a hazard consisting of a prepared area of ground, often hollow, from which turf or soil has been removed and replaced with sand or the like. DECISION ON THE RULES OF GOLF 2000-2001 (United States Golf Association and the Royal and Ancient Golf Club of St. Andrews, 1999 at Definitions 3). Bunker, hazard, sand trap or trap can be used interchangeably. *Id.*

<sup>191</sup> NICHOLAS, *supra* note 188.

<sup>192</sup> See DECISION ON THE RULES OF GOLF 2000-2001 (United States Golf Association and the Royal and Ancient Golf Club of St. Andrews, 1999).

<sup>193</sup> *Id.* at Rule 28, Ball Unplayable 469.

spot from which the original ball was last played.<sup>194</sup> Thus, a player would not drop his ball near the bunker, he would have to go back and re-hit his shot from the prior spot and incur a one-stroke penalty.<sup>195</sup> Any other alteration to accommodate disabled golfers in a sand trap is not something the court or the ADA can decide. It is an element of golf that should be jointly decided by the USGA and the PGA Tour.

### III. PROFESSIONAL GOLF AND THE ADA

Accommodations for disabled individuals, such as allowing golf carts on greens, teeing-grounds and sand traps may be a reasonable accommodation for recreational use, but not necessarily for the PGA Tour. There are many differences between recreational and professional golf.<sup>196</sup> One difference is the handicap system.<sup>197</sup> Handicaps are used in recreational golf to even out the playing field among the different skill levels of competitors. On the tour, there are no handicaps.<sup>198</sup> Also, golf carts are not typically used during a professional tournament.<sup>199</sup> There are exceptions to this rule, such as on the Senior PGA Tour, where carts are permitted, but usually, players prefer to walk.<sup>200</sup> Most recently, disabled players with permission from the PGA, such as Casey Martin, are allowed to use carts.<sup>201</sup> Casey Martin's use of a cart, however, is limited. He may not drive his cart on greens, in bunkers or on teeing-grounds.<sup>202</sup> Essentially, Martin's use of a cart is restricted to travel along the fairways.<sup>203</sup>

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<sup>194</sup> *Id.* at Rule 28(a), Ball Unplayable 469.

<sup>195</sup> *Id.*

<sup>196</sup> See DECISION ON THE RULES OF GOLF 2000-2001 (United States Golf Association and the Royal and Ancient Golf Club of St. Andrews, 1999).

<sup>197</sup> *Id.*

<sup>198</sup> *PGA Tour Inc.*, 532 U.S. at 686. A player's handicap is determined by a formula that takes into account the average score in the 10 best of her 20 most recent rounds. *Id.* The difficulty of the different courses played and whether or not a round was a "tournament" event are additional factors added into a player's handicap. *Id.*

<sup>199</sup> *Id.* at 685

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

## A. THE ATEEA AND PGA TOUR

It is possible, however, that the PGA will encounter a disabled golfer that is confined to a wheel chair who needs access to the entire course with a specialized cart. It is uncertain whether a disabled player needing complete use of a specialized cart on greens, teeing-grounds and bunkers will be able to compete at a professional level.<sup>204</sup> The courts, however, determine the reasonableness of an accommodation or its burden on a case-by case basis. An individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances as well as necessary for that person, and yet at the same time not create a fundamental alteration.<sup>205</sup> Despite the absence of exact precedents, the best case to predict how a court will rule in allowing a disabled player the use of a specialized cart on greens, tees and bunkers while competing in professional golf is *PGA Inc. v. Casey Martin*.<sup>206</sup>

In *PGA Inc. v. Casey Martin*, the Court ruled the use of a golf cart does not fundamentally alter the nature of the game because a cart only has a peripheral impact on the nature of the sport and that the fundamental nature of golf is "shot-making."<sup>207</sup> Additionally, the Court reasoned that golf is a game in which it is impossible to guarantee that all competitors will play under exactly the same conditions or that an individual's ability will be the sole determinant of the outcome.<sup>208</sup> The Court gave examples of events that can occur during a round that may advantage or disadvantage a competitor's play.<sup>209</sup> For instance, weather may produce harder greens or a lucky bounce off a tree or cart path may save a shot or two.<sup>210</sup>

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<sup>204</sup> Professional golfers shoot below par or better. Par is the number of shots a low handicapper should take for a hole or round. My Golf Record, definition available at <http://www.mygolfrecord.com/gterms.phy?action=list+letter=G>. (last visited Feb. 11, 2003). The hole par is measured by the number of shots needed to reach the green plus two for the putting. *Id.* The round par is calculated by adding all the hole par's together. *Id.*

<sup>205</sup> *PGA Tour Inc.*, 532 U.S. at 688.

<sup>206</sup> See *PGA Tour Inc.*, *supra* note 6.

<sup>207</sup> *Id.* at 683.

<sup>208</sup> *Id.* at 687.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

There is a strong argument that a paraplegic player who does not have use of his legs, but could play golf at a professional level from the seat of his specialized cart, should be allowed to compete on the PGA. Since the Court has defined golf as "shot-making" and stated that the use of a cart only has a peripheral impact on the game, a disabled player could compete on the PGA tour.<sup>211</sup> Looking, however, at the intimate details for the rules of golf, it seems that such an accommodation would not be possible.<sup>212</sup>

According to USGA rule 13-4b, a player's golf club, a piece of equipment, may not touch the sand before making a stroke at the ball resting in a bunker.<sup>213</sup> An argument may arise that a golf cart is also a piece of equipment that cannot touch the sand when a player is hitting a shot from a sand trap. Thus, if a golf cart is considered a piece of equipment, then allowing golf carts to enter a bunker would violate a rule with respect to hazards, a fundamental aspect of golf.<sup>214</sup>

On the other hand, a disabled player's use of a specialized cart for golf is comparable to the use of his legs. A player enters a trap and prepares for a shot by "taking-stance."<sup>215</sup>

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<sup>211</sup> As long as played in accordance with the United States Golf Association and the Royal and Ancient Golf Club of St. Andrews.

<sup>212</sup> See *infra* note, 212.

<sup>213</sup> DECISION ON THE RULES OF GOLF 2000-2001 (United States Golf Association and the Royal and Ancient Golf Club of St. Andrews, 1999, Rule 13-4b at Ball Played as it Lies 175).

<sup>214</sup> A hazard is any bunker or water hazard. DECISION ON THE RULES OF GOLF 2000-2001 (United States Golf Association and the Royal and Ancient Golf Club of St. Andrews, 1999, at Definitions 6).

<sup>215</sup> The definition of "taking-stance" is when a player places his feet in a position for and preparatory to making a stroke. DECISION ON THE RULES OF GOLF 2000-2001 (United States Golf Association and the Royal and Ancient Golf Club of St. Andrews, 1999, Rule 13-4/24 at When Stance Taken in Bunker 199-200). See discussion in "A Modification of The Rules of Golf for Golfers with Disabilities" as approved by The United States Golf Association and the Royal and Ancient Golf Club of St. Andrews, Scotland (2001) available at [http://www.usga.com/rules/golfers\\_with\\_disabilities.html](http://www.usga.com/rules/golfers_with_disabilities.html). The preface states: In modifying the Rules of Golf for golfers with disabilities, *the desired result should allow the disabled golfer to play equitably with an able-bodied individual* or a golfer with another type of disability. It is important to understand that this critical objective will occasionally result in a modification to a Rule, which may seem unfair at first glance because a more simplified answer may appear to exist when two golfers with the same disability are playing against one another. *Id.* Again, the argument the author makes is that re-defining golf terminology for recreational use may be ok, but with respect to professional tournaments, such an accommodation is fundamentally altering the nature of the game.

Thus, a handicapped golfer using his specialized golf cart to line up for a shot could be considered "taking-stance."

Another scenario could arise when a disabled player enters a bunker to address his shot. Under USGA rule 18-2b/3, if a player's ball moves when he was in the process of, but had not completed taking his stance in the bunker, no penalty is incurred because the ball moved before the player actually addressed the ball.<sup>216</sup> If, however, the player's approach to the ball or the act of taking his stance caused the ball to move, the player incurs a penalty stroke and the ball must be replaced.<sup>217</sup> Thus, if carts are allowed in bunkers, there is a greater possibility that a player's ball will move from the shift in the sand from the amount of force the cart exerts. To accommodate carts in hazards, certain terms in golf would have to be re-defined. For instance, "taking-stance" is described in the USGA rulebook as in a bunker, some "digging in" with the feet.<sup>218</sup> This language supports an argument that allowing disabled golfers to hit out of a bunker from a cart would fundamentally alter the nature of the game because key terminology to the rules of golf would need to be re-evaluated. Then again, a disabled player may never need to hit out of a trap. Players have an option to declare their ball unplayable, re-hit from the previous location and incur a penalty stroke.<sup>219</sup> Thus, if a disabled player hits his ball in the sand, he can opt to declare it unplayable, place the ball in its previous location, take a penalty stroke and continue to play.<sup>220</sup> Only one or two strokes, however, typically separate winners of golf tournaments from the rest of the field. Hence, since the object of golf is to complete an 18-hole round with as few strokes as possible, it is unlikely that a serious competitor would want to incur more strokes than absolutely necessary even though the penalty strokes are an option.

Allowing disabled golfers to access bunkers with specialized carts would fundamentally alter the nature of professional golf.<sup>221</sup> Because there are defined rules with

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<sup>216</sup> *Id.* at Rule 18-2b/3, Ball at Rest Moved 294.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at Rule 13-4/23, Ball Played as it Lies 199-200.

<sup>219</sup> *Id.* at Rule 28, Ball Unplayable 469.

<sup>220</sup> *Id.*

<sup>221</sup> CARTER, *supra* note 136.

respect to bunkers, such an accommodation could be criticized on grounds that the ADA is changing the rules of golf and overstepping its authoritative boundaries for integrating the disabled into everyday main stream life.

#### IV. SOLUTIONS FOR THE FUTURE

The overall concept of the ADA is clear: people with disabilities are entitled to the same treatment as people without disabilities.<sup>222</sup> What remains unclear is which structural modifications of golf courses are required. If the tradition-bound world of golf is not ready for drastic changes, such as allowing golf carts in bunkers, on greens and teeing-grounds, there are still ways golf clubs can make reasonable accommodations so that disabled golfers may comfortably enjoy the game of golf.

##### A. SPECIALIZED GOLF CARTS

Golf courses could accommodate a disabled golfer without creating an undue burden by allowing a disabled golfer to bring her own golf cart to use on the course.<sup>223</sup> If clubs are not required to provide specialized carts for disabled golfers, then clubs should allow disabled players to bring their own.<sup>224</sup> Golf course managers would be able to inspect a disabled person's golf cart to insure that the cart would cause no more damage to a course than those already provided by the club.<sup>225</sup> For instance, golf carts that are gasoline powered tend to damage a course due to leakage of gas and oil.<sup>226</sup> Thus, club managers should be allowed to regulate whether they prefer customized electric or gas golf carts for disabled players.<sup>227</sup>

##### B. CARTS ON GREENS AND TEE GROUNDS

Another way golf club owners can more reasonably accommodate disabled golfers is by permitting them to use

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<sup>222</sup> See 42 U.S.C. § 12182(2)(A)(ii)-(iii) (2000).

<sup>223</sup> PRETEKIN, *supra* note 67.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

their specialized carts on greens and teeing-grounds that are safely accessible. Not all greens and teeing-grounds are easily accessible.<sup>228</sup> Unless the ADA's Advisory Committee creates "course assessors" or develops general guidelines for golf course superintendents to follow with respect to specialized golf cart access to these prohibited areas, it will be up to the clubs to decide how, if at all, to accommodate disabled golfers. Hence, course superintendents and club professionals would be operating on the "honor system" and would need to survey their course and determine which greens and teeing-grounds are appropriate for cart access.

### C. CART PATHS CLOSER TO GREENS AND TEEING-GROUNDS

If a club will not allow specialized golf carts to drive onto greens and teeing-grounds, then golf courses can alternatively accommodate disabled golfers by paving cart paths close enough to greens and teeing-grounds to ensure easy access to these parts of a course. By strategically placing cart paths closer to the areas of a course that are typically off limits to golf carts, course managers and superintendents will not have to worry about players disobeying the cart path rules and driving all over the golf course to access these historically prohibited sections of a course. In the recently approved guidelines for recreational golf, however, the Access Board determined that providing handrails through greens and teeing grounds is hazardous because of the danger of golf balls ricocheting off the rails. Similarly, placing paved cart paths closer to greens, tees and bunkers is hazardous, as well, because balls have a greater chance of hitting the cart path causing a "bad bounce"<sup>229</sup> off the path, or landing further away than a player intended. For this reason, repaving cart paths closer to greens and tees may seem like a reasonable accommodation, but not the best accommodation because it would substantially alter the nature or service provided, making the course "play" more difficult than its designer intended and also by posing additional safety

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<sup>228</sup> CARTER, *supra* note 136.

<sup>229</sup> "Bad bounce" is somewhat of a slang term in golf for when the golf ball takes a hard bounce off a paved cart path and it is indeterminable as to where the ball landed or if the ball lands in an unfavorable part of the course such as a body of water or in a bunker.



hazards from a potential increase in balls ricocheting off the cart path.

#### D. ENACT GUIDELINES FOR GOLF COURSE ARCHITECTS AND DEVELOPERS

Many existing golf courses may not be able to provide complete cart access to all greens and tees on a course. Liability issues arise because some greens and tees are set on steep slopes, making it dangerous for carts to access. For that reason, it is possible for the ADA to enact guidelines for future golf courses. Section 303(a)(1) of the ADA requires all commercial facilities and public accommodations to design and construct new facilities that are readily accessible to individuals with disabilities.<sup>230</sup> The ADA, however, does provide a limited exception for a business that can establish that it would be structurally impractical to make the facility accessible. Thus, the public entity would have to prove that the accessibility standards would actually destroy the physical integrity of the facility. With respect to golf courses, the Advisory Committee could establish maximum and minimum slope requirements. These guidelines would not interfere with the artistic nature of developing a challenging and enjoyable golf course. For instance, for greens with a 40-degree or greater slope, somewhere along the back or side of the green could be a paved cart path leading up to the surface of the green. Hence, if golf course architects are required to design courses to reasonably accommodate disabled players, then they can plan accordingly so that the physical integrity of the facility is not compromised. Incorporating accessibility features into designing a new golf course is easier than incorporating these features into an existing facility.

#### V. CONCLUSION

The ADA was enacted to provide a clear and comprehensive mandate to eliminate the segregation and isolation of disabled persons from everyday mainstream

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<sup>230</sup> 42 U.S.C. § 12183(a)(1) (2000).

activities.<sup>231</sup> Legislative efforts to integrate the disabled have impacted on an array of public entities, including golf clubs. Accordingly, private and public golf clubs may have to modify their facilities in compliance with the ADA to accommodate disabled golfers. Disabled people are excluded from participating in the game of golf due to inadequate accessibility to certain parts of a course, including greens and tees, and unavailable equipment, such as specialized golf carts. Despite these limitations, it is possible for golf clubs to make readily achievable accommodations for disabled golfers. Some golf clubs will have a harder time in making reasonable accommodations because of a particular course layout. For these courses, allowing disabled golfers to bring their own specialized carts to access as many tees and greens as possible is one way of reasonably accommodating disabled golfers. A more practical alternative is to set specific regulations and guidelines for new golf courses being developed which will ensure more accommodating facilities. The framework for the ADA has been in place for over ten years. This, combined with the publicity that the *Casey Martin* case has brought to the tradition-bound world of golf suggests that there are no excuses for inadequate accommodations for golf courses. Making golf courses accessible to disabled golfers not only involves modifying the rules of play, but more importantly educating staff and members to welcome golfers with disabilities.<sup>232</sup> For this reason, it is essential that golf clubs step-back, evaluate their course accommodations under the ADA, and make every effort possible to create reasonable accommodations for disabled golfers.

*Janet Barbookles\**

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<sup>231</sup> 42 U.S.C. § 12101 (2000).

<sup>232</sup> MARSHALL, *supra* note 8.

\* J.D. Candidate, 2004, Golden Gate University School of Law, San Francisco, California; B.S., 2000, Northeastern University, Boston, Massachusetts. Pop -- this comment is dedicated to you in sincere appreciation for being a constant inspiration to me, for teaching me the game of golf, and most importantly, for supporting me throughout all my academic and personal endeavors. This Comment was the collective work of many great people. My sincerest thanks to my faculty advisor, Myron Moskovitz, for his insurmountable guidance and expertise with journal writing. Many thanks to my Editor-in-Chief, Vicki Trapalis; journal editors, Kathleen Casewell and Rebecca Gross; and to Maryanne Gerber and Brian Burke for all their editorial guidance throughout the writing of this Comment. With genuine appreciation to Steve

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